



COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
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Commissioner

**November 20, 2008**

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In the Matter of  
Helder Garcia

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Docket No. 2008-065  
DEP File No. SE-148-1175

**RECOMMENDED FINAL DECISION**

**INTRODUCTION**

In this case, the petitioner, Helder Garcia, appeals the decision of the Southeast Regional Office of MassDEP ("SERO Office" or "MassDEP") denying his appeal for an Amended Superseding Order of Conditions ("Amended SOC"). On October 16, 2008, I issued an order directing the petitioner to Show Cause by Friday, October 24, 2008, why I should not dismiss this appeal for failure to state a claim upon which relief can be granted. The petitioner failed to comply with my Order. Accordingly, pursuant to 310 CMR 1.01(15)(f)(vi); 310 CMR 1.01(10); 310 CMR 1.01(11)(a)2.f; and on the grounds set out by MassDEP in its motion to dismiss, I recommend that MassDEP's Commissioner issue a Final Decision dismissing this appeal for



failure to comply with the Presiding Officer's Order and failure to prosecute.

### **PRIOR PROCEEDINGS**

1. On August 26, 2008, MassDEP's SERO Office in accordance with the Wetlands Protection Program Amended Order Policy denied the petitioner's appeal for an Amended SOC. The denial stated in pertinent part: "[t]here is no provision in the wetland regulations that requires the issuing authority to consider or act upon a request to amend a Final Order of Conditions. There is no right to request a Superseding Order of Conditions or an Adjudicatory hearing if a request to amend is not granted. The only opportunity for further review of the proposed amendments to the project is the filing of a New Notice of Intent." See Determination, at pp. 1 (¶ 2).

2. On September 12, 2008, MassDEP's SERO Office in accordance with the Wetlands Protection Program Amended Order Policy issued a corrected Determination that denied the petitioner's appeal for an Amended SOC. The corrected denial stated in relevant part: "The applicant, the landowner, any person aggrieved by this Reviewable Decision as defined at 310 CMR 10.04, who previously participated in the proceedings leading to the reviewable decision, the conservation Commission, or any ten (10) residents of the city or town where the land is located if at least one resident was previously a participant in the permit proceeding, are hereby notified of their right to appeal this Reviewable Decision pursuant to G.L. c. 30A, § 10 provided the request is made by certified mail or hand delivery to the Department along with appropriate filing fee and a MassDEP Fee Transmittal Form within ten (10) business days of the date of issuance of the this Superseding Order or Determination, and addressed to Case Administrator Department of Environmental Protection, One Winter Street 2<sup>nd</sup> Floor, Boston, MA 02108." See Determination, at pp. 1 (¶ 3).

3. On September 16, 2008, the petitioner mailed to MassDEP's Office of Appeals and Dispute Resolution ("OADR") a thirty (30) page document, which he described as "Appeal Notice for an Adjudicatory Hearing appealing a DEP decision not to accept an appeal for a SOC and for Denying a Request for Reconsideration of the decision outlined in the Letter Dated August 26, 2008."

4. The petitioner's Appeal Notice and Request for Consideration appear to be contrary to the express regulatory process which makes clear that "the only opportunity for further review of the proposed amendments to the project is the filing of a new Notice of Intent as set forth in 310 CMR 10.05."

5. On October 16, 2008, I ordered the petitioner to file a legal memorandum with OADR showing cause pursuant to 310 CMR 1.01(6)(d) why I should not dismiss this appeal pursuant to 310 CMR 1.01(11)(d) for failure to state a claim upon which relief can be granted. See Order to Show Cause, Order pp. 3 (¶ 2). The deadline for the petitioner to respond to the Order to Show Cause was October 24, 2008. Id.

6. On October 22, 2008, counsel for the petitioner moved to extend the time in which to respond to the Order to Show Cause up to and including October 31, 2008. As grounds for the extension, he asserted that "[the petitioner] was out of town, returning on October 23, 2008." See Petitioner's Motion To Extend Time To Respond To The Order To Show Cause.

7. On October 30, 2008, counsel for the petitioner filed a second motion to extend the time in which to respond to the Order to Show Cause up to and including November 7, 2008. As grounds for this second extension, he asserted that "the state policy that does not permit an applicant to appeal while granting that right to an abutter raised constitutional questions

requiring more research.” See Petitioner’s Second Motion To Extend Time To Respond To The Order To Show Cause.

8. On October 30, 2008, I allowed the petitioner’s motion pursuant to 310 CMR 1.01(3)(d), to extend time up to an including November 7, 2008 with no further extensions. See Ruling and Order On Motion To Extend Time pp. 2 (¶ 1).

9. The petitioner did not respond to the Order to Show Cause by the November 7, 2008 deadline or thereafter. On November 14, 2008, the Department moved pursuant to 310 CMR 1.01 (11)(d)(1), to dismiss this appeal for failure to comply with the Presiding Officer’s Order and failure to prosecute. See Department’s Motion to Dismiss.

### **DISCUSSION**

#### **THE PETITIONER’S APPEAL SHOULD BE DISMISSED DUE TO THE PETITIONER’S FAILURE TO COMPLY WITH THE PRESIDING OFFICER’S ORDER AND TO PROSECUTE THE APPEAL.**

The Rules of Adjudicatory Procedure at 310 CMR 1.01 (“the Adjudicatory Rules”) govern this appeal’s resolution and accord Presiding Officers broad authority to resolve appeals. Specifically, under 310 CMR 1.01(5)(a), “[t]he Presiding Officer may, on [his or her] own initiative or a party’s motion where appropriate, *without limitation*”:

5. issue orders to show cause;
6. impose sanctions under 310 CMR 1.01(10); . . .
7. request from the parties a statement of the issues in dispute and then define the issues to be adjudicated; . . .[and]
15. prescreen appeals and determine their potential amenability to settlement through alternative dispute resolution and early resolution through motions to dismiss. . . .

310 CMR 1.01(5)(a).

As noted above, under 310 CMR 1.01(5)(a)15, a Presiding Officer has the power to

“prescreen appeals and determine their potential amenability to settlement through alternative dispute resolution and early resolution through motions to dismiss.” The regulation provides that the Presiding Officer’s pre-screening authority includes, “*without limitation*,” the power “issu[e] orders to parties, *including without limitation*, ordering parties to show cause, . . . and ordering parties to provide more definite statements in support of their positions.” 310 CMR 1.01(5)(a)15d (emphasis supplied).

The broad case management authority of Presiding Officers under the Adjudicatory Rules is also evidenced by the Presiding Officers’ powers to enforce their orders or directives in cases. Under 310 CMR 1.01(11)(a)2.f, a “Presiding Officer may summarily dismiss a case *sua sponte*,” when the petitioner fails to prosecute the appeal or fails to comply with an order issued by the Presiding Officer. For the same reasons, the Presiding Officer may also dismiss an appeal pursuant to 310 CMR 1.01(5)(a)15 and 310 CMR 1.01(10)(e).

The Presiding Officer may also impose sanctions on a party where “[the] party . . . demonstrates an intention to delay the proceeding[s] or resolution of the proceedings” in an appeal. 310 CMR 1.01(10). This includes a party who files pleadings or other papers in an appeal “interposed for delay.” 310 CMR 1.01(4)(b).

The range of sanctions that a Presiding Officer may impose on a party, include, “without limitation,” an order:

- (a) designating facts or issues as established against the party being sanctioned;
- (b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;
- (c) denying summarily late-filed motions or motions failing to comply with 310 CMR 1.01(4);

- (d) striking pleadings in whole or in part;<sup>1</sup>
- (e) dismissing the appeal as to some or all of the disputed issues;
- (f) dismissing the party being sanctioned from the appeal; and/or
- (g) issuing a final decision against the party being sanctioned.

310 CMR 1.01(10).

In this case, as discussed above at p. 4, on October 16, 2008, I ordered the petitioner to file a legal memorandum with OADR showing cause pursuant to 310 CMR 1.01(6)(d) why I should not dismiss this appeal pursuant to 310 CMR 1.01(11)(d) for failure to state a claim upon which relief can be granted. The initial deadline for the petitioner to respond to the Order to Show Cause was October 24, 2008. Per the petitioner's requests, the deadline was extended to October 31, 2008 and then to November 7, 2008. To date, nearly two weeks have expired since the November 7<sup>th</sup> deadline, and the petitioner has failed to respond to the Order to Show Cause. Specifically, the petitioner has failed to provide with me any basis not to dismiss this appeal.

Dismissal of the petitioner's appeal is well within the range of remedial measures authorized by 310 CMR 1.01(10)(e) and 310 CMR 1.01(11)(a)2.f for the petitioner's failure to prosecute an appeal or failure to comply with an order issued by the Presiding Officer. Here, the petitioner has both failed to prosecute his appeal and comply with my directives by failing to file a response to my Order to Show Cause. Accordingly, I recommend that the Department's Commissioner issue a Final Decision dismissing this appeal pursuant to 310 CMR 1.01(10)(e) and 310 CMR 1.01(11)(a)2.f.

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<sup>1</sup> Under 310 CMR 1.01(11)(c), "the Presiding Officer may [also] strike from a pleading any insufficient allegation or defense or any redundant, irrelevant, immaterial, impertinent or scandalous matter."

## **CONCLUSION**

For the reasons set forth above, I recommend that the Department's Commissioner issue a Final Decision dismissing this appeal due to the petitioner's failure to comply with the Presiding Officer's Order and failure to prosecute the appeal. 310 CMR 1.01(10); 310 CMR 1.01(11)(a)2.f.

## **NOTICE-RECOMMENDED FINAL DECISION**

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.

This final document copy is being provided to you electronically by the Department of Environmental Protection. A signed copy of this document is on file at the DEP office listed on the letterhead.

November 20, 2008

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Beverly Coles-Roby  
Presiding Officer

**SERVICE LIST**

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Helder Garcia

Docket No. WET-2008-065  
DEP File No. SE-148-1175

Representative

**Party**

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PETITIONER

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DEPARTMENT

Date: November 20, 2008